FILED
AUG 10 1942
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 290

M. EDWARD BUCKLEY, JR.,
Petitioner,

vs.

DISTRICT OF COLUMBIA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

M. EDWARD BUCKLEY, JR.,
Pro se.

INDEX.

Subject Index.

	Page
Petition for a writ of certiorari	1
Statement of case	2
Statutes involved	3
Statement of points	4
Summary of argument	4
Argument	5
Conclusion	13

Table of Cases Cited.

Hopkins v. *U. S.*, 4 App. D. C. 430	9
Landers v. *State*, 26 Ala. App. 506, 162 So. 550	7
People v. *Johnson*, 372 Ill. 18, 22 N. E. 683	11
Trawick v. *City of Birmingham*, 23 Ala. App. 308, 125 So. 211	6
United States v. *General Motor Corp., et al.*, 121 Fed. (2d) 376	8
West Virginia v. *Ward*, 112 W. Va. 522, 165 S. E. 803, 85 A. L. R. 1175	10

Statutes Cited.

Act of Congress of March 3, 1911, c. 231, sec. 269, 36 Stat. L. 1163, as amended (28 U. S. C. 391)	10
Act of Congress of February 27, 1931, 46 Stat. 1424, chapter 317, 5th Supp. 1929 Code of Laws of the District of Columbia, Title 6, paragraph 247, sec. (b).	3
American Law Reports, Volume 85, p. 1177	10
Constitution of the United States, Fifth Amendment	5
Traffic and Motor Vehicle Regulations for the District of Columbia, amended June 6, 1939, section 23, para. (a)	4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 290

M. EDWARD BUCKLEY, JR.,

Petitioner,

vs.

DISTRICT OF COLUMBIA, A MUNICIPAL CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

PETITION FOR WRIT OF CERTIORARI.

Petitioner, M. Edward Buckley, Jr., in the causes pending in the United States Court of Appeals for the District of Columbia, entitled "District of Columbia vs. M. Edward Buckley, Jr., number 7959" pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered on March 30, 1942, setting aside the order of Judge Newman, sustaining the petitioner's plea in bar.

Statement of Case.

Defendant below was charged with operation, on July 21, 1940, of a motor vehicle while under the influence of intoxicating liquor (R. 6). To this information defendant entered a plea of "Not Guilty" and demanded trial by jury. Thereafter, on October 30, 1940, an Assistant Corporation Counsel entered a nolle prosequi to this information, No. 484,063 (R. 7). Subsequently, on January 13, 1941, defendant entered a plea of "Guilty" to an information, No. 497,300, charging a violation of one of the traffic regulations of the District of Columbia (operating a motor vehicle and failing to keep to the right of the street). On defendant's plea of guilty a judgment was entered and a fine of $25.00 was imposed by Judge Newman, one of the Judges of the Police Court (R. 30). On February 25, 1941, information No. 501,335, charging defendant with a violation of an Act of Congress relating to the operation of a motor vehicle while under the influence of intoxicating liquor was filed in the Police Court (R. 1-3). This information was practically the same as No. 484,036, heretofore referred to. To this information defendant filed an amended plea in bar of autrefois convict. The District of Columbia then filed a replication, to which replication defendant filed a demurrer. On hearing before Judge Neilson, one of the Judges of the Police Court, the demurrer was overruled and the case ordered to trial (R. 3-18). On June 20, 1941, while Judge Neilson was presiding in the jury branch of Police Court, defendant withdrew his demand for jury trial and moved the Court to certify the case to the traffic branch of the Police Court in which Judge Newman was presiding. When the case was called before Judge Newman, defendant moved the Court to allow him to withdraw his plea of not guilty and to reenter his plea in bar (R. 4). The District of Columbia objected to the defendant's motion and gave

notice of its intention to apply to the Court of Appeals if the Court's determination was such that it would be entitled to an appeal (R. 31). Judge Newman ruled that defendant was entitled to withdraw his plea of guilty and enter a plea in bar (R. 4). Thereafter Judge Newman called for argument on the issue of double jeopardy. Argument on this issue was had before Judge Newman in the same manner as if the issues presented to Judge Neilson on May 1, 1941 were ordered reheard (R. 30). On June 23, 1941 the Court ruled that the plea in bar of autrefois convict should be granted. To the decision which, in effect, sustained defendant's demurrer, the District of Columbia noted an exception in open Court and announced its intention to apply to the Court of Appeals for the allowance of an appeal (R. 31).

It is stated in Judge Newman's opinion (R. 19): "On January 25, 1941, the Corporation Counsel filed a new information against the defendant, again charging him with driving while intoxicated, which said charge, it is conceded, is the same as that for which the defendant was charged on July 22, 1940, and which said former charge the Corporation Counsel nol-prossed. It is also conceded that the charge of driving on the wrong side of the street, to which the defendant pleaded guilty, occurred at the same time at which the defendant was charged with driving while intoxicated." (Emphasis supplied.)

Statutes Involved.

Information 484,036 and 501,335 are based on an Act of Congress passed February 27, 1931, 46 Stat. 1424, chapter 317, 5th Supp. 1929 Code of Laws of the District of Columbia, Title 6, paragraph 247, Section (b):

> "No individual shall, while under the influence of any intoxicating liquor or narcotic drug, operate any

motor vehicle in the District. Any individual violating any provision of this subdivision shall upon conviction of the first offense be fined not more than $500 or imprisoned not more than six months, or both; * * * Upon conviction of a violation of any provision of this paragraph the Clerk of the Court shall certify forthwith such conviction to the designated agent of the Commissioners, who shall thereupon revoke the operator's permit of such individual."

Information No. 497,300 was based on Section 23, paragraph (a), Traffic and Motor Vehicle Regulations for the District of Columbia, amended June 6, 1939, which reads as follows:

"Vehicles shall be driven upon the right half of the highway and the driver shall drive as closely as practical to the right hand edge or curb of the highway."

Statement of Points.

Defendant intends to rely on the following points:

1. The Court did not err in sustaining defendant's plea in bar of former jeopardy.

2. The Court did not err in recognizing the agreement (express or implied) with the Government that the charge of driving while intoxicated would be dismissed upon a plea of guilty to driving on the wrong side of the road, the lesser offense embraced therein.

Summary of Argument.

1. The Court did not err in sustaining the plea of former jeopardy. A single cause of action consisting of the continuous operation of an automobile cannot be split into a multiplicity of offenses, when the splitting of such causes would result in gross injustice to the accused and would result in persecution rather than prosecution. There is

specific authority for holding that when the defendant is charged with speeding, and driving while drunk, a prosecution on the former charges precludes the government from prosecuting on the latter. If all of the facts are before the prosecutor at the time action is initiated, he has an option as to the charges to be brought, and a failure to bring action other than that initiated is a waiver of other charges involved in the same act.

2. The Court did not err in recognizing the agreement (express or implied) with the government that the charge of driving while intoxicated would be dismissed upon a plea of guilty to a lesser offense. The prosecutor is primarily charged with what charges, if any, shall be brought, and whether such charges shall be prosecuted. He is the sole judge as to the initiation of action and its continuance; the court has no power with respect to either. Public records disclose hundreds of cases in which the prosecutor has accepted a plea of guilty to a lesser offense. To hold that such persons may be thereafter held to answer for the greater would be a perversion of justice. The prosecutor, in the light of indicated statistics, and on principles of common justice, should be held to his agreements.

Arguments.

I.

Protection against double jeopardy is no invention of the Courts, but a right guaranteed by the Constitution of the United States. "No person * * * shall be subject for the same offense to be twice put in jeopardy of life or limb." (U. S. Constitution, Art. V, Amed.) Similar provisions are found in most, if not all, of the States. If the defendant has a right guaranteed by the Constitution, no amount of vituperation will deter this Court from protect-

ing him in its exercise. Cases here—and in all courts—must be decided on the principles of justice and not of popular clamor for a victim of the moment.

> "The legal question then comes to this: "Is a former conviction for the offense of driving on the wrong side of the street a bar to subsequent prosecution for the offense of driving while under the influence of intoxicating liquor, where both offenses arise out of the same transaction?"

In *Trawick* v. *City of Birmingham*, 23 Ala. A. 308, 125 So. 211, decided in 1929, the defendant was charged with speeding and convicted. Thereafter he was charged with having been intoxicated on the same occasion. A plea of former jeopardy was sustained by the appellate court. In the course of its opinion the court said:

> "The driving of this automobile by this defendant while he was intoxicated and the driving of the automobile by the defendant at an unlawful rate (speeding) were, though separate and distinct offenses, violations of separate and distinct ordinances, the outgrowth of one act. While, as argued by counsel, one might be guilty of driving while intoxicated and yet drive in a lawful manner, or might drive at a reckless rate of speed and still be sober, still the fact persists that they arose out of the same act. To permit the splitting of the one act into two offenses would be no different from allowing one to be prosecuted twice for firing one shot that killed two persons, or killed one and wounded another; or where the one act of introducing a file into a prison brought about the escape of two prisoners; or where one person had at the same time in his possession two receptacles each containing prohibited liquor. Indeed, it is conceivable, and quite probable, that this appellant violated, in addition to the ordinances noted, other ordinances having to do with traffic regulations."

The same ruling was followed in *Landers* v. *State*, 26 Ala. App. 506, 162 So. 550, decided in 1935. In that case the defendant was charged in two counts, first: driving while intoxicated, and, second: driving "carelessly and heedlessly in wilful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger" persons or property.

The testimony indicated that both charges grew out of the same transaction. The jury convicted the defendant on both counts, after the court had refused to charge the jury: "You cannot find defendant guilty under both counts of the complaint." The court's refusal so to charge was held error on appeal—the appellate court saying:

> "It has long been the rule of Alabama courts that, where an indictment, information or affidavit, in a criminal case contains several counts arising out of the same offense, a verdict of the jury finding the defendant guilty on one of the counts operates as an acquittal as to the other counts. (And cases cited).
>
> "What we have written above being true, and it being the law that "one single transaction or state of facts cannot be so split up as to convict the defendant of several separate and distinct offenses" (citation) it becomes apparent that appellant was entitled to have given at his request written charge 2 quoted above."

The foregoing cases are directly in point. The Government cites cases to the contrary. Modern justice is now engaged in weeding out and over-ruling outmoded decisions. Neither a multiplicity of decisions on a particular subject, nor their antiquity, is indication that the cases are fundamentally right, or that they should be followed. One case to the contrary today may (and should) turn the stream of justice into a more enlightened course.

Even the lack of precedents can be overcome by this Court creating them. This thought was expressed by Mr. Justice Walter J. Lindley in the course of his unreported opinion (but which is a part of the record in the case) in *United States* v. *General Motor Corporation, et al.*, (reported on appeal in 121 F. (2d) 376):

> "I observed in a late opinion of the Supreme Court of the United States that one of the justices recently appointed expressly said that the court had been reconstructed. The fair implication of that opinion, as I read it, is that precedents may be of little avail and lack no bar."

This court is called upon to decide just how far one continuous act may be split up into many separate offenses. There must be some limit to the governmental power in this respect.

In the course of continuously driving an automobile down one street, the defendant may exceed the speed limit, then slow down, then resume his former speed; on several occasions he may go slightly to the wrong side of the road. The question is: to what extent can the government take each of these violations as separate offenses—return an information in many counts, including, perchance, additional charges of driving while drunk and reckless driving—and secure convictions on all the charges preferred? If the answer be in the affirmative, and the full penalty of the law is imposed in each instance, with sentences to run consecutively, the defendant might spend the rest of his life imprisoned—all for one continuous drive in one city block. This cannot be a modern concept of justice.

If the prosecutor has all the facts before him, as in this case, it would seem that in justice to the defendant, the prosecutor should prefer charges for all known offenses growing out of the same transaction—or that charges not preferred could not again be prosecuted.

The government refers (R. 10) to *Hopkins* v. *U. S.*, 4 App. D. C. 430. In that case a charge of assault was preferred at a time when the victim was still alive—at which time no other charge could be brought. The government had no election. Later the victim died—and the defendant was then charged with murder. The court held that there was no former jeopardy because of the lack of power in the government to prosecute for the offense of murder at the time the first prosecution was initiated.

In the instant case, the government had all of the facts before it and elected to proceed on the charge of driving on the wrong side of the street. In so doing, the government should be held to have waived its right to prosecute for other offenses (if any) committed at the same time as a part of the same continuous transaction.

II.

The Court did not err in recognizing the agreement (express or implied) with the government that the charge of driving while intoxicated would be dismissed upon a plea of guilty to driving on the wrong side of the road, the lesser offense embraced therein.

The first and second points of petitioner's argument run together in many instances, and in part overlap.

Judge Newman's opinion (R. 27) takes into consideration the fact that it is within the power of the prosecutor to determine the charge to be preferred, the necessity for the further prosecution of the case, the substitution of lesser charges (with or without an agreement between the prosecutor and the accused). He held that express or implied agreements between the prosecutor (representing, as he does, the power and authority of the government) and the accused, for the withdrawal of a higher charge for a plea of guilty to the lesser charges, requires the court to carry out such agreement, even if the prosecutor refuses to do so.

With respect to any agreement between the government and the accused as to the withdrawal of the higher, and the substitution of the lesser, charge, reference is made to the opinion of Judge Newman (R. 27), which should be considered by the court as a part of the record under the Act of Congress of March 3, 1911, c. 231, sec. 269, 36 Stat. L. 1163, as amended; (Title 28, sec. 391 U. S. C.), requiring the court to determine the case "after an examination of the entire record before the court".

In *West Virginia* v. *Ward*, 112 W. Va. 522, 165 S. E. 803, 85 A. L. R. 1175 the defendant was indicted in 14 counts for violations of the banking laws. It was agreed between the State and his counsel that (subject to the approval of the court) the defendant might plead guilty to one count and the others would be nolled. The court approved the agreement, accepted a plea of guilty on the first count, sentenced the defendant thereunder, and the other counts were dismissed. After the defendant had served his term, the attorney general caused him to be re-indicted under the other 13 counts. A demurrer to a special pleas was sustained by the trial court—and the ruling was reversed on appeal.

In the course of its opinion, the appellate court calls attention to the fact that the attorney general in England had the sole power to enter a nolle prosequi "by virtue of the office and the law" in the absence of a statute to the contrary.

There are no statutes in force in the District of Columbia requiring the approval of the court to the entry of a nolle—and the prosecutor's judgment, on the necessity for the entry must be taken as final. There is, therefore, no merit to the contention of the author of the note in 85 A. L. R. 1177 (cited in the government's brief on page 20) that:

> "* * * The fact that the agreement was approved by the trial court is, of course, of vital importance.

> "It does not appear in any of the other cases which have been found, that the trial court had sanctioned the agreement in question."

If the government's contention be correct, how can the sanction of the court give greater weight to an act which only the prosecutor has the undisputed right to do?

In *People* v. *Johnson,* 372 Ill. 18, 22 N. E. 683 the court said:

> "The People acting through their duly constituted authorities reached an agreement with the defendants at the time the motion was made to strike the indictment. In pursuance of this agreement the People accepted $21,000. In view of these payments by the defendants the prosecuting officers are in honor bound to carry out the terms of their agreement. If the administrative and prosecuting agencies of the People fail to keep their legitimate agreements, public policy and the great ends of justice require the court to prevent such breaches of the faith." (Emphasis supplied.)

If such agreements, express or implied, are not kept, the administration of justice would be seriously hampered, the prosecutor's office brought into a position where its solemn promises would be treated as worthless, and the public faith in the entire judicial system undermined. Must the prosecutor be compelled to resort to a subterfuge in order to keep his agreements in respect to the entry of a nolle prosequi —namely, to call the case, have a jury impanelled, call a witness, have him sworn—and then enter a nolle? Such a procedure would result in jeopardy. Is it not more consonant with principles of common justice to support the original action of the prosecutor in dismissing the higher charge and accepting a plea of guilty to the lesser?

A decision refusing to uphold the prosecutor's power to accept a plea of guilty to a lesser offense would have far reaching consequences.

The records of the Police Court of the District of Columbia are public records, of which this court may take judicial note. Those records disclose that, as far as drunken driving cases are concerned:

In 1940 in cases where defendant was imprisoned pending trial:

163 were arrests
50 cases had no prosecution or had charges entered for lesser offenses.

In 1940 in cases in which defendant gave bond:

218 arrests
129 altered to lesser offenses.

In 1941 through Sept. 22 (imprisonment pending trial):

152 arrests
22 altered to lesser offenses, or no charge.

In 1941 through Sept. 22 (released on bond):

33 arrests
31 in which no papers were filed, were nolled or reduced to lesser offenses.

It would, therefore, appear from this record that there are now in the District of Columbia some 233 persons who may, at the caprice of the prosecutor, be arrested and charged with drunken driving, notwithstanding the fact that charges against them have been nolled, or that they pleaded guilty to, or were convicted of, lesser offenses, and have paid their fines or served their sentences, or both, as a result of an express or implied agreement with the prosecutor as to what, under oath, he regarded the particular course to best subserve the enforcement of law.

On this showing, is not the prosecutor bound to keep faith —and if he does not, is it not the bounden duty of this court to compel him so to do?

Conclusion.

The concluding paragraphs of the opinions in the Police Court Judges are identical, namely:

> "It might be added, however, that this Court would welcome further expression from our Court of Appeals on the precise point involved in respect to cases dealing with traffic, and it is suggested that counsel for defendant, in his discretion, take steps looking to further expression on this proposition from that tribunal."

It is respectfully submitted that the Police Court should not be instructed as to matters of procedure at the expense of the substantial rights of the defendant.

For the foregoing reasons, it is respectfully submitted that the order of Judge Newman sustaining the petitioner's plea in bar should be affirmed.

Respectfully submitted,

M. EDWARD BUCKLEY, JR., *Pro se,*
406 5th St., N. W.,
Washington, D. C.